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In the Supreme Court of the United States

OCTOBER TERM, A. D., 1926

No. [redacted] 211

T. H. SEALLWOOD, *et al.*,
Petitioners,

v.

JUAN G. GALLARDO, Treasurer of Porto Rico,
Respondent.

No. [redacted] 212

ADOLFO VALERA GIMENEZ, *et al.*,
Petitioners.

v.

JUAN G. GALLARDO, Treasurer of Porto Rico,
Respondent.

No. [redacted] 213

INSULAR MOTOR CORPORATION, *Petitioner.*

v.

JUAN G. GALLARDO, Treasurer of Porto Rico,
Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRITS OF CERTIORARI.

GEORGE C. BUTTE,
Attorney-General of Porto Rico,
WILLIAM CATTRON RIGBY,
Lieutenant Colonel, Judge Advocate,
Attorneys for Respondent.

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In the Supreme Court of the United States.

OCTOBER TERM, A. D., 1926

No. 1018.

T. H. SMALLWOOD, *et al*,
Petitioners,

v.

JUAN G. GALLARDO, Treasurer of Porto Rico,
Respondent.

No. 1019.

ADOLFO VALDES ORDONEZ, *et al*,
Petitioners,

v.

JUAN G. GALLARDO, Treasurer of Porto Rico,
Respondent.

No. 1020.

INSULAR MOTOR CORPORATION, *Petitioner*,

v.

JUAN G. GALLARDO, Treasurer of Porto Rico,
Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRITS OF CERTIORARI.

REASONS WHY WRITS OF CERTIORARI SHOULD NOT ISSUE.

The single ground stated by petitioners as a reason for the issuance of the writs of certiorari in these cases is that, as petitioners claim,

"These cases involve an important federal question which has been decided below in a way probably in conflict with the applicable decisions of this court." (Petition, pp. 1–2.)

No other ground is alleged in the petition.

Respondent submits, however, that an examination of the petition shows that no ground appears for the issuance of the writs in these cases, because:

(1) It appears that the opinion and decrees of the Circuit Court of Appeals were strictly in accord with the applicable decisions of this court (*Woodruff* v. *Parham*, 8 Wall. 123, *Saunderson* v. *Cureton*, 262 U. S. 506; *Texas Co.* v. *Brogan*, 258 U. S. 466, 476–477) and

(2) In any event the questions petitioners seek to submit are no longer of general importance, since by the amendment of Section 3 of the Organic Act of Porto Rico ("Jones Law", 39 Stat. 953) effected by Section 1 of the recent Act of March 4, 1927 (S. 4247, Pub. No. 797, 68th Cong.), Congress has now expressly provided:

> "That the internal revenue taxes levied by the Legislature of Porto Rico in pursuance of the authority granted by this act on articles, goods, wares, or merchandise, *may be levied and collected as such Legislature may direct, on the articles subject to said tax, as soon as the same are* manufactured, sold, used, or *brought into the island: Provided*, That no discrimination be made between the articles imported from the United States or foreign countries and similar articles produced or manufactured in Porto Rico. Officials of the Customs and Postal Services of the United States are hereby directed to assist the appropriate officials of the Porto Rican government in the collection of these taxes."

Congress having thus expressly declared that the Porto Rican government does have the power to levy taxes such as those here assailed, the questions sought to be presented by petitioners no longer have any general public interest, but affect only these particular suits and any others that may have been brought prior to that declaratory amendment to the Organic Act.

(3) *The questions here sought to be presented by these petitioners have now become moot*, since, by the amendment of Section 48 of the Organic Act of Porto Rico effected by Section 7 of the Act of March 4, 1927 (S. 4247, Pub. No.

797, 69th Cong., *supra*), no suit for the purpose of restraining the assessment or collection of any tax imposed by the laws of Porto Rico may now be "maintained" in the Federal District Court for Porto Rico; and, therefore, in case the decrees of the District Court in these cases dismissing the bills of complaint were reversed and these cases sent back to that court, that court could do nothing but dismiss them for want of jurisdiction, because they are all purely suits to enjoin collection of Insular taxes imposed by the laws of Porto Rico, which suits may no longer be "maintained" in the District Court, under the express prohibition of Congress.

POINT I.

THE OPINION AND DECREES OF THE CIRCUIT COURT OF APPEALS WERE STRICTLY IN ACCORD WITH THE APPLICABLE DECISIONS OF THIS COURT.

The position now taken by these petitioners in their petition here, and in their brief in support of it, is tantamount to saying that Porto Rico is not within the protection of the tariff wall of the United States; and that, therefore, goods brought into Porto Rico from the continental United States are to be considered in the same way as though they were imports from foreign countries.

But it is clear that it was the intention of Section 3 of the Foraker Act (Act of April 12, 1900, 31 Stat. 77-78; continued in effect by Section 58 of the "Jones Act"; 39 Stat. 958; p. 29 "Appendix" to Petitioners' Brief) *to establish free trade between Porto Rico and the continental United States.* That section provides:

> "Sec. 3. That on and after the passage of this Act all merchandise coming into the United States from Porto Rico and coming into Porto Rico from the United States shall be entered at the several ports of entry upon payment of 15 per centum of the duties which are required to be levied, collected and paid upon like articles of merchandise imported from foreign countries; * * * *: *Provided*, That * * * * whenever the legislative assembly of Porto Rico shall have enacted and put into operation a system of local taxation * * * * and shall by resolution duly passed so notify the President, he shall make proclamation thereof, and thereupon all

> *tariff* duties on merchandise and articles going into Porto Rico from the United States or coming into the United States from Porto Rico shall cease, and from and after such date all such merchandise and articles shall be entered at the several ports of entry free of duty; and in no event shall any duties be collected after the first day of March, 1902, on merchandise and articles going into Porto Rico from the United States or coming into the United States from Porto Rico."[1] (*Italics ours.*)

In other words, it is believed to be plain beyond peradventure that it was the obvious intent of Congress to bring Porto Rico within the tariff wall of the United States, and to place it in exactly the same position so far as concerns goods brought into it from the continental United States, or sent from it to one of the States of the Union, as though it were itself a State.

That is to say, it is believed clear that there is precisely the same right to bring goods into Porto Rico from New York that there is to take goods into Louisiana or Iowa or Mississippi from New York,—*and subject to the same right of the jurisdiction into which they are brought, to tax them.* That is to say, if these identical statutes here in question had been passed by Louisiana, then, if those laws of Louisiana would be valid and the taxes levied under them assessable against goods brought into Louisiana from New York under the same conditions as those under which the automobiles here in question were brought into Porto Rico, in that case these laws of Porto Rico are likewise valid, and these taxes properly assessable against the goods here in question.

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[1] The substance of the above section (Sec. 3 of the Foraker Act, 31 Stat. 77, 78) is epitomized in Section 738 of Chapter 4, Title 48 of the new United States Code (printed on page 29 of the "Appendix" to Petitioners' brief), but in so doing the editors of the Code have failed to give effect to the word "tariff" in the phrase "*tariff* duties" as used in Section 3 of the Foraker Act as above quoted. But that word "tariff" is believed to be of vital importance. It characterizes the kind of "duties" to which Congress was referring in the immediately following clauses of that section of the Foraker Act. Plainly what Congress had in mind were simply the "*tariff* duties" collected at the custom houses, a phrase which is by no means coextensive with the phrase "any *imposts or duties on imports or exports*" as used in Clause 2 of Section 10, Article I, of the Constitution, the latter phrase, limiting the power of the States, having been construed by this court in *Brown v. Maryland*, 12 Wheat. 419, and many following cases, to include very much more than tariff duties.

But it is only *tariff* duties which are within the purview of Section 3 of the Foraker Act.

"Free trade" between Porto Rico and the continental United States means exemption from "*tariff* duties."

But it is manifest that under the decisions of this Court in *Woodruff* v. *Parham*, 8 Wall. (U. S.) 123, and *Sonneborn* v. *Cureton*, 262 U. S. 506 (TAFT, CH. J.), such a law by Louisiana would be valid, and would be assessable against the property of petitioners in the circumstances shown by these cases; since it

(a) does not prohibit the sale or disposition or use of the goods in Louisiana (*Porto Rico*);

(b) does not discriminate against goods brought in from another State in favor of those manufactured in Louisiana (*Porto Rico*);

(c) is levied alike on all property within Louisiana (*Porto Rico*); and

(d) is not a *tariff* duty levied before entry and delivery of the property to its owner, but is strictly an exicse or internal revenue tax.

Strictly speaking, *Brown* v. *Maryland* has no application here, since there is not here, as there was there, any *discrimination* against goods brought in from another State.

THE DECISIONS FOLLOWING BROWN V. MARYLAND CLEARLY FALL INTO TWO STREAMS OF DECISION, AS POINTED OUT BY CHIEF JUSTICE TAFT IN SONNEBORN V. CURETON, SUPRA, 262 U. S. 506, VIZ., ONE LINE OF DECISIONS HEADED BY LOW V. AUSTIN, 13 WALL. 29, 32, RELATING TO THE EFFECT OF CLAUSE 2, SECTION 10 OF ARTICLE I OF THE CONSTITUTION, FORBIDDING ANY STATE WITHOUT THE CONSENT OF CONGRESS FROM LAYING ANY "IMPOSTS OR DUTIES UPON IMPORTS" FROM ANY FOREIGN COUNTRIES; AND ANOTHER DISTINCT LINE OF AUTHORITIES HEADED BY WOODRUFF V. PARHAM, SUPRA, 8 WALL. 123, RELATING TO THE POWER OF CONGRESS TO REGULATE THE CARRIAGE OF GOODS FROM ONE STATE TO ANOTHER UNDER THE COMMERCE CLAUSE, CLAUSE 3 OF SECTION 8, ARTICLE I OF THE CONSTITUTION.

The decisions relating to the prohibition against the States, under Clause 2 of Section 10 to "lay any imposts or duties on imports" *from foreign countries*, hold that that prohibiton prevents the levying, not only of *tariff* duties, but also of *any imposts* of any kind whatever upon imports so long as they remain the property of the importer and in the original packages.

But, quite to the contrary, the decisions relating to the power of Congress to regulate commerce between the States under the "commerce clause", Clause 3 of Section 8 of Article I, *consistently hold that the States may levy internal revenue and excise taxes and other taxes on property brought in from other States, as soon as it has "come to rest" within the State, provided only,* as above observed, that such taxes shall not be discriminatory, shall not be levied against such property *because* it has been brought into the State from another State, and that there shall be no prohibition of its sale or other transfer within the State. The mere fact that the property is of a kind not manufactured within the State does not prevent its being taxed like any other property within the State. For instance, Georgia may tax automobiles or oil, although no automobiles may be manufactured or oil produced within the limits of Georgia.

Texas Co. v. *Brown*, 258 U. S. 466, 476–77.

The taxes here in question conform to all of these rules.

The only statutory prohibiton or limitation by the Organic Act or any other act of Congress against or upon the legislative power of the Legislature of Porto Rico, is that it shall not levy *tariff* duties against property brought in from the United States or elsewhere. These taxes are not *tariff* duties, but internal revenue taxes. They are valid, and are enforceable against these petitioners.

POINT II.

It is believed unnecessary to add anything to the statement of this point hereinbefore made (ante, "(2)", page 2), which is self explanatory. In view of the amendment there quoted of March 4, 1927, to Section 3 of the Organic Act of Porto Rico, *it cannot now be properly said that the questions here presented are any longer of general public interest.*

POINT III.

The questions here sought to be presented by these petitioners have now become moot, since the amendment of Section 48 of the Organic Act of Porto Rico, by Section 7 of the Act of March 4, 1927 (Pub. No. 797, 69th Cong.)

The Act of March 4, 1927.

In the supplemental brief of counsel in support of the petition for writs of certiorari in these cases, counsel anticipates an objection to the granting of the writs, namely, the effect of Section 7 of the Act of Congress of March 4, 1927, amending Section 48 of the Organic Act of Porto Rico by adding thereto the following:

"That no suit for the purpose of restraining the assessment or collection of any tax imposed by the laws of Porto Rico shall be maintained in the District Court of the United States for Porto Rico."

This Act was passed before the petitions for writs of certiorari were filed in these cases and after the Circuit Court of Appeals for the First Circuit had decided these cases (January 7, 1927) against the present petitioners.

Counsel for the respondent, Juan G. Gallardo, Treasurer, in four other tax injunction cases pending in the said Circuit Court of Appeals, on March 22, 1917, filed motions to dismiss the appeals on the ground of said Act of Congress of March 4, 1927 (see copy of motion in Appendix hereto). The said Court in its decision of one of said cases (*Juan G. Gallardo*, Treasurer, appellant, v. *Porto Rico Railway, Light and Power Company*, Case No. 2058, decided April 11, 1927, not yet reported) discussed said point as follows:

> "It is contended that this Act destroys the jurisdiction otherwise inherent in the court below and in this court. We are unable to adopt that view. The interpretation of this Act falls under the general rule recently stated by the Supreme Court in *Fullerton* v. *Northern Pacific*, 266 U. S. 435, 437, as follows:
>
> > "It is a rule of construction, that all statutes are to be considered prospective, unless the language is express to the contrary, or there is necessary implication to that effect."
>
> citing *Harvey* v. *Tyler*, 2 Wall. 328, 347; *Sohn* v. *Waterson*, 17 Wall. 596, 599; *Twenty Per Cent Cases*, 20 Wall. 179, 187; *Chew Heong* v. *United States*, 112 U. S. 536, 559; *Shaub* v. *Doyle*, 258 U. S. 529, 534; *Hopkins* v. *Lincoln Trust Co.*, 233 N. Y. 213.

> We see nothing in this amendment indicating that Congress intended to apply it to pending cases. Nor do we think that the word "maintained" is to be construed to cover actions already instituted. Similar language has been held inapplicable to pending suits. *Moon* v. *Durden*, 2 W. H. & G. (Exch.) 21 (1848); *Knight* v. *Lee*, 1893, 1 Q. B. D. 41; *Burbank* v. *Inhabitants of Auburn*, 31 Me. 590 (1850); *Gumpper* v. *Waterbury Traction Co.*, 68 Conn. 424 (1896); *Smith* v. *Lyon*, 44 Conn. 175 (1876)."

Counsel in his supplemental brief in this Court (page 2) undertakes to state respondent's position with regard to the Act of March 4, 1927, as follows: "The reason assigned is that the new enactment is retroactive. There is no warrant for that interpretation." We are thoroughly in accord with counsel for the petitioners on the elementary doctrine as to the present and prospective effect in general of statutes.

We have never believed or asserted that the Act of March 4, 1927, is retroactive. Indeed, we do not see how that Act does or could have any retroactive effect. There is no question involved here of vacating any proceedings had prior to March 4, 1927. Our position is that on March 4, 1927, Congress said to the United States District Court in Porto Rico: "*Stop with these tax injunctions; stop in your tracks!*" Far from contending that the law is retroactive, we insist that it had a very present effect upon all such suits pending on March 4, 1927, or thereafter to be commenced. The power of that Court to enforce this particular remedy (injunction) in this class of cases was definitely taken away on March 4, 1927, and there being no saving clause that pending suits might be prosecuted to a definitive conclusion under the former power of the Court and on appeal, they must necessarily abate.

> In re *Hall*, 167 U. S. 38.
> *Hallowell* v. *Commons*, 239 U. S. 506.
> *Federal Land Bank* v. *U. S. Nat. Bank*, 15 F. (2nd) 36 (1926).
> 15 Corp. Jur. 825.

All the cases involved in this petition for writs of certiorari were decided in favor of the respondent, Juan C. Gallardo, Treasurer of Porto Rico, by both the District Court in Porto Rico and the Circuit Court of Appeals. Has this Court the

power now to reverse those decisions and direct the District Court in Porto Rico to grant a new trial or to take any other steps that would constitute a maintenance of the suits for injunction? Could the appellate courts by a mandate require the District Court in Porto Rico to exercise a jurisdiction expressly prohibited by the Act of March 4, 1927? Obviously not.

Gordon v. *United States*, 117 U. S. 697.
U. S. v. *McCoy*, 91 Fed. Rep. 295.
Parr v. *Colfax*, 197 Fed. Rep. 302.

It is contended, as a matter of construction, that the language "no suit . . . shall be *maintained*" in the Act of March 4, 1927, means only that "no suit . . . shall hereafter be *commenced*."

It is true that this restricted interpretation of the word "maintained" (for obviously, to maintain a suit it must be commenced) has been resorted to, as a matter of construction, in order to avoid a harsh and unjust result, which it was presumed was not within the intention of the legislative body. Such are most of the cases cited in the decision of the Circuit Court of Appeals above quoted.

In *Moon* v. *Durden*, 2 W. H. & G. (Exch.) 21 (1848) the statute using that word not only prohibited every form of legal remedy for the enforcement of the right involved, but destroyed the right itself in express terms. To make the provision as to the remedy apply to suits previously brought and still pending would be giving a retroactive effect to the other part of the statute which declared the right itself null and void—and that result a divided Court held not to be the intention of Parliament.

So, too, in the case of *Knight* v. *Lee*, 1893, L. R. 1, Q. B. D. 41, the statute providing that "no action shall be brought or maintained to recover any such sum of money" also enacted that the contract itself "shall be null and void." As the Court said, "here the right accrued before the statute was passed," and held it was not the intention of Parliament to make the Act retroactive by cutting off suits already brought for the enforcement of the right.

So, too, in *Gumpper* v. *Waterbury Traction Company*, 68 Conn. 424, it was a substantive right that would have been impaired by making the statute involved apply to pending suits.

In all of these cases, therefore, the restrictive meaning of "commenced" placed on the word "maintained" has its justification in the presumed intention of the legislature not to impair or destroy retroactively some *vested substantive right*. Clearly, only some such exceptional circumstance could justify such an interpretation of the word "maintain" which, in its ordinary meaning, would include not only the institution of an action but its continuance as well.

See "Words and Phrases," under the word "maintain"

Vol. 5 (First Series).
Vol. 3 (Second Series).

Manifestly, the Act of Congress of March 4, 1927, is something wholly different from these statutes in which the word "maintained" was interpreted to mean only "hereafter commenced." The Act of March 4, 1927, does not impair or destroy any substantive right. Nor does the Act take away every form of legal remedy.

As this Court said in the case of *Hallowell* v. *Commons*, 239 U. S. 506, regarding the statute there in question, it

> "takes away no substantive right but simply changes the tribunal to hear the case."

These complainants must go into law instead of into chancery. The Act of March 4, 1927, simply reaffirms the purpose of Congress that U. S. R. S. 3224 shall be effective in Porto Rico, as in the Federal Government since 1864.

There is no question of the power of Congress to enact this statute. *No person has a vested right in any particular form of* legal *remedy.*

In the absence of any saving clause as to pending suits, in the Act of March 4, 1927, or of any crucial circumstance justifying the reading of a saving clause into the Act by interpretation, we respectfully submit that this petition should be denied for want of jurisdiction.

POINT IV.

Respondent, appellee in the Circuit Court of Appeals, and defendant in the District Court, insisted in each of those courts that a court of equity was without jurisdiction to enjoin the taxes here in question, both because these petitioners (plaintiffs and appellants in the lower courts) had and have an adequate remedy at law by paying the taxes and suing for their return under the "tax refund" Acts of Porto Rico; and also because, under Section 3224 of the Revised Statutes a Federal court might not enjoin Insular taxes levied under Federal (as contra-distinguished from State) authority by the federal court might not enjoin Insular taxes levied under Federal (as contra-distonguished from State) authority by the Legislature of Porto Rico, an instrumentality of Congress.

The Circuit Court of Appeals overruled those contentions and dealt with the cases on their merits, holding that there was jurisdiction in equity.

In case this court should decide to grant writs of certiorari to these petitioners, and thus open these cases for review in this Court, the respondent would desire leave to assign cross-errors on these questions.

CONCLUSION.

It is respectfully submitted that the petition for writs of certiorari in these cases should be denied.

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May 6, 1927.